

**Transcript of Media Teleconference by the Department of the Interior
Secretary of the Interior Announces Final Narrow Changes to ESA Section 7 Regulations
December 11, 2008
2:00 pm ET**

Operator: Welcome and thank you for standing by.

At this time, all participants are in a listen-only mode. During the question and answer session, please press star 1 on your touch tone phone.

Today's conference is being recorded. If anyone has any objections, you may disconnect at this time.

Now, I will turn the meeting over to Mr. Chris Paolino. You may begin.

Chris Paolino: Thank you. My name's Chris Paolino. I'm the Deputy Director of Communications at the Department of the Interior.

Thank you for joining us on the call today. In just a moment, Secretary Kempthorne will announce changes to regulations clarifying the role of global processes and consultation under the Endangered Species Act.

Joining us on the call today are Secretary of the Interior, Dirk Kempthorne, D-I-R-K K-E-M-P-T-H-O-R-N-E, Assistant Secretary for Fish and Wildlife and Parks, Lyle Lavery, L-Y-L-E L-A-V-E-R-T-Y, and the Director of the U.S. Fish and Wildlife Service, Dale Hall, D-A-L-E H-A-L-L.

In just one moment, I'll turn it over to Secretary Kempthorne for opening comments. Following that, we'll have an opportunity for members of the media to ask questions.

At this time, it's my honor to introduce Secretary Kempthorne.

Dirk Kempthorne: I want to thank all of you for joining us today. Because of the importance and the interest in this issue, I've chosen this format so that we can have this discussion and I have Lyle Lavery with me, Dale Hall with me, Lynn Scarlett may be able to join us, so that we can take your questions because I think it's extremely important that we have clarification and full understanding of this issue.

On May 14 of this year, recognizing the effects that melting sea ice were having or expected to continue to have on the survival chances of the polar bear, I announced that the U.S. Fish and Wildlife Service was listing the polar bear as a threatened species under the Endangered Species Act. It was the right decision.

It utilized the Endangered Species Act for the purpose it was conceived, to identify, protect, ultimately revitalize threatened or endangered species and follow the science.

Many cheered the announcement. Most, because they care about the polar bear and, like me, want to protect it. However, some cheered because they thought they had a backdoor, a loophole, if you will, to implement climate change policies.

I was clear that day when I said, and I'm going to say it again:

"Listing the polar bear as a threatened species can reduce avoidable losses of polar bears. But it should not open the door to use the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources. That would be a wholly inappropriate use of the Endangered Species Act. ESA is not the right tool to set climate change policy."

At that time, several newspapers editorialized in agreement with me, including “The New York Times.” In fact, “The Washington Post,” wrote, and I quote:

“Though the polar bear deserves protection, the Endangered Species Act is not the means and the Fish and Wildlife Agency is not the agency to arrest global warming.”

Congress is the most appropriate venue for discussion of national climate policy. The President has himself said: “There is a right way and a wrong way to approach reducing greenhouse gas emissions. The American people deserve an honest assessment of the costs, benefits and feasibility of any proposed solution. Discussions with such far-reaching impact should not be left to unelected regulators and judges, but should be debated openly and made by the elected representatives of the people they affect.”

When I listed the polar bear, almost seven months ago to the day, many of you were there and heard my words when I said:

“The ESA regulatory language needs to be clarified. We will propose common sense modifications to the existing regulation to provide greater certainty that this listing will not set a backdoor climate change policy outside our normal system of political accountability.”

And so, it should come as no surprise that, today, the Department of the Interior and the Department of Commerce are announcing final regulations clarifying a segment of the consultation process under Section 7 of the Endangered Species Act, particularly as it relates to global processes like climate.

These changes represent common sense modifications. The rule was narrowed from the proposed regulation so there will be fewer opportunities for federal agencies to proceed without consultation. These changes are the direct result of the comments received during the public comment process.

But, in any case, the decision has always been with the federal agency as to whether to consult. Let me be clear. These regulations do not amend the Endangered Species Act itself; only Congress can do that. These are modifications to our regulation and they are very basic.

Section 7 of the ESA looks at a specific impact on a specific species from a specific action. Under the ESA Section 7, federal agencies are required to ensure that actions they fund, authorize, permit or otherwise carry out are not likely to jeopardize the continued existence of a listed species or adversely modify designated critical habitats.

Here's how it works. Those federal agencies first determine if their proposed action may affect a listed species or critical habitat. If so, they must then proceed with either formal or informal consultation with the U.S. Fish and Wildlife Service or the National Marine Fishery Service. For decades, under the ESA, federal agencies have made their own determination about whether to consult on the project. That continues under this rule.

With the regulations finalized today, federal agencies must still comply with all existing consultation procedures except in specific and limited instances where an action is not anticipated to harass, harm, kill or otherwise take a listed species.

And (1), the action has no effect whatsoever on a listed species or critical habitat, such as replacing a culvert when the species is not present; or (2) the action is completely and totally beneficial, such as expanding the no hiking

zone from 15 yards to 30 yards around a nesting site; or (3) the effects of the action are so insignificant that they cannot be detected or measured, such as when a federal project generates noise at such low levels that scientists cannot accurately detect its harm to a species; or (4) the effects of the action are the result of global processes that are too broad to measure, whether from a power plant or a backyard barbeque.

However, nothing in this rule discourages federal agencies from pursuing the informal consultation process.

What we are doing is clarifying the threshold for consultation to occur. If science cannot draw a direct causal link between an action and an effect on a listed species as is currently the case with the global processes like climate change, then consultation under the ESA is not necessary.

I recognize that any modifications involving the ESA are inherently controversial. The law invokes great emotion across the country. Will everyone agree with this decision? I don't expect so. Even within my own department of 70,000, there are differences of opinion as to the process that was taken in making this decision.

But, I'm confident that we've taken a common sense approach, developed over months of work, to adopt needed and legally appropriate changes to our existing regulation. Nothing in this regulation relieves a federal agency of its responsibilities to ensure that listed species are not harmed during an action regardless of whether consultation is undertaken or not.

I'll now turn to our Assistant Secretary of Fish and Wildlife and Parks, Lyle Lavery.

As all of you know, the Assistant Secretary's responsibility is to sign any changes to regulation. So, Lyle, I will turn to you, I would ask what process did we go through and your final determination on this.

Lyle Laverty: Thank you. Thank you, Secretary.

Briefly, the process started following the Secretary's direction for us to develop a set of common sense regulations that could deal with the implementation of Section 7. That process started right after the announcement in May.

And, in August of this year, the Fish and Wildlife Service, as well as the Department of Commerce, the National Marine Fisheries, published in the Federal Register, proposed revisions for these elements in the regulations of Section 7.

That notice that we sought the public's review and comments for 30 days and that was subsequently extended for another 30 days, and we received the comments, approximately 230,000, comments from folks with a variety of different ideas on the proposal.

We spent a considerable amount of time sorting, analyzing and reflecting on the comments and, subsequent to those comments, we made adjustments to the proposed regulation that was published in August. And, in this final regulation that we're announcing today, have actually refined many of the points.

There were essentially three areas that this regulation addresses that the Secretary talked about. One is that it redefines or clarifies three definitions that have caused some confusion over the last several decades and that, you

know, deals with the biological assessment, cumulative effects with the effects of the action.

Second is, the Secretary addressed the regulation and offers guidance to the action agencies regarding the consultation. And I would reinforce again, that in the proposal and this final rule, there is nothing that removes the responsibility from the action agency and their responsibilities and obligations under the Act.

It is the responsibility of every agency to act in a manner that won't jeopardize the continued existence of a species. So, it's – it's been a very important part.

And then, the third part of it addresses the idea of the informal consultation that allows the informal process to move forward in a much more orderly and predictable fashion.

And, based on the comments, we made these adjustments and narrowed, in fact, the final rule from that that was proposed.

Dirk Kempthorne: Okay. And what is extremely important to me, because I've seen some of the comments made by some organizations, some indications from the media, of what this rule will do or not do. And, some of them have suggested such wide-ranging implications.

It was very important for me to, in my own thinking, to affirm that this rule was doing what we said it would do and it would not go beyond that. That, in fact, this rule is beneficial, that it clarifies, that it helps.

And, one of the individuals that I asked that question of specifically was Dale Hall. And so, Dale, again, if you would just address the substance of the rule and your views on that.

Dale Hall: Thank you, Secretary, and thank you for the openness of the process that we've been going through as well.

I think that these things that have been laid out already trying to deal with greenhouse gas emissions, how do we do that under Section 7, has been an issue for a little while now.

And so I sought the advice of Mark Myers, the Director of USGS, who we turn to for our scientific guidance on what we can do and can't do. And when science meets law is when we have to understand what we can do under the law and what we can't.

And Director Myers wrote me a memo and I subsequently put out an internal policy inside the Fish and Wildlife Service because, at this point in time, the science is not there for us to be able to take a specific emission point or groups of points for that matter, and be able to track those around the globe and have them follow the dots as the courts have asked us to do, connect the dots, to the point of saying that will cause this ice to melt, as an example, for the polar bear.

And so, we have said that the ESA is really not the mechanism to try and address that right now because the science isn't there to try and help us make that connection that the law requires us to have.

And so, I think that the people working on this have done a good job of trying to clarify that and move forward my policy that I have already put out on how we deal with those sorts of things when a power plant, as an example, is being built somewhere and our, frankly, inability to track those emissions to a specific action point.

You know, and then, the second thing, you know, some definition of terms that have been ambiguous for quite a while and some criticisms that the Fish and Wildlife Service have had is that we're not consistent across the country and how we implement the law because we have different offices that may interpret them different ways.

And so, I'm also – I also feel positive that they've tried and, I think, made better, the ability to understand those terms.

The most important thing in trying to carry out the law, is to understand what it says and what it means when you're trying to implement it on the ground. And when you have inconsistent interpretations, it really is difficult for the public and us to figure out how to deal with that.

And then, the other things in there that Lyle talked about trying to improve our consultation process. And I do want to reiterate something here that's been said. No action agency can take a species without consulting with us and getting the authorization.

The only thing that this rule changes in that aspect, and I've heard some concerns that agencies could just make the decision and move forward and build dams and do whatever, and that just isn't correct.

The key is that, today, under the regulations, if an action agency decides that it may affect, but it's not likely to adversely affect, those are the terms, which means that take will not occur, the Fish and Wildlife Service has to take staff time to concur with it, with that finding.

All this does is say that that action agency has the full responsibility to both make that decision and defend that decision without having to send it to us and take our staff people off something they're working on that really doesn't

benefit the species in order to answer those questions. Because, they're still liable for take, if take occurs. And so that's really all this does.

So, the context – the content of the rule is something that I believe came from the Fish and Wildlife Service in the form of questions and things that we identified that could be helpful and I believe that the people who worked on this did a really, really good faith effort to try and address that. And, I think, in the long term, that these will be beneficial to our ability to implement the law and no harm to the species in the process.

You know, my only concern as the Secretary openly said, we don't always come down with the same finding, but my only concern was in the process and as we move forward. But, that – but I have no concerns with what's in the rule itself.

Dirk Kempthorne: Okay, Dale, and I appreciate that very much.

The rule, and Dale just – again, I'll turn to you. But do you believe that the rule helps? Does it help with clarifying and is it of benefit to species and does it have any negative impact to the Endangered Species Act?

Dale Hall: Well, let me start off with that latter one. I can find no negative impact because we know, our folks on the ground, know when a project is going in. They know when the Corp of Engineers, the Bureau of Reclamation, the Highway Department, they know when they're going to build projects. And the mechanism in the regulations that allows us to say, no, we want to consult on this one because we think there might be some harm, is still there.

Our folks on the ground still have the ability to invoke Section 7 consultation with the agency even if the agency has determined that there's not likely to adversely affect. So there's an assurance there in that check and balance.

And, on the positive side, if when we eliminate a confusion about, if we have to consult on a power plant or on some sort of construction that will have greenhouse gas emissions, when we already know scientifically that we can't meet the standard of the law in assigning responsibility for take as a result of that to a specific entity, that does save time and allows us to put that time on actions and activities that will really benefit the species.

And so, I do think that this will be beneficial in both the operations of the Endangered Species Act and I don't see any harm anywhere in what's being proposed to the species.

Dirk Kempthorne: Okay, Dale, thanks very much. Let me just turn to Lyle for one last comment on this aspect of what is required by these different action agencies and what responsibility they have and what is – what ramifications if they don't follow it?

Lyle Laverty: Thank you, Secretary. One of the things Dale, and just builds off your comment, that there's – we've seen lots of information circulating around about what this regulation is going to do or not do.

But, one of the things I think is important to reinforce is that there's nothing in this regulation that requires a federal agency to bypass the informal consultation. There's nothing that requires that.

And, I think the other piece is there's nothing in this regulation that precludes a federal agency from seeking the expertise that comes from folks within the Fish and Wildlife Service or the National Marine Fisheries. And I think that becomes an important part because a lot of information is loaded, that's the other part.

But, one of the questions that I have receive from folks is the idea that, if an agency or federal agency or a proponent has limitations on its ability to make the determination whether it's of effect or no effect, that this regulation doesn't preclude them from coming to the Fish and Wildlife Service to seek that kind of skill and expertise that the Service can offer in helping make those kinds of determinations.

So, I think Dale building on one of the comments or the comment that you've shared, one of the benefits of this regulation is that it (lights) some clarity for some of these areas. And, given the importance of time as resource, this can help focus resource agencies on those issues that have the potential to impact the species.

The other part that I share over and over again with folks that I have talked with around the country is that there is absolutely nothing in this regulation that recuses the action agency of its responsibilities to ensure that a species, a listed species is not harmed.

And there's been a lot of conversations I have had with folks that believe that this is going to release an agency from their responsibility and we just need to reinforce that point over and over again that there is nothing in this regulation or proposed changes that would relieve them of that. And it's – I think it reinforces again the relationship the Service has with most of the action agencies.

And, again, speaking from personal experience, since these conversations are ongoing constantly about the consultation and the conversations about species and the impact a proposed project may have.

Really, when you talk about the importance of responsibility that comes back to an agency, the responsibility is that if it's a real harm then that line officer

is subject to both civil and criminal penalties. And as a line officer or a former line officer, I understand exactly what that is and I believe that folks in action agencies truly understand their role of responsibility.

So, it's important for me to reinforce that nothing in this proposal makes any adjustments on that point and that those responsibilities still rest with the action agencies.

Dirk Kempthorne: Okay, with that, Chris, let me turn it back to you to moderate and we'll receive the questions from the media.

Chris Paolino: Operator, I believe we're ready for our first question.

Operator: Thank you. If you would like to ask a question, please press star 1 and record your name.

Our first question comes from Felicity Barringer.

Felicity Barringer: Yes, can you hear me?

Chris Paolino: We can.

Felicity Barringer: Yes, question for the Secretary. You alluded to internal debate on this. What were the internal objections and from what part of the agency did they come? And then, a second quick question, how does this change enhanced protection of endangered and threatened species?

Dirk Kempthorne: Well, Felicity, I will just tell you. This issue is no different than many of the tough controversial issues we deal with in this department. And I don't know what is gained by going through the discussion, again, I think you hear that there is strong support of the substance of this rule.

There have been questions, some concerns expressed about the process, but, that's why I went through this record, when I announced that we would, in fact, list the bear, I said, that we needed to have a narrowly defined change to the rule dealing with this issue so that there is not a backdoor to climate change policy.

We then issued that rule. We then went out for public comment and, in fact, extended it by 30 additional days to take in additional comment from the public. Because of the input that we did receive from the public, we made changes to that original language. It is more narrow.

And, so there's the question of the process. But, again, Lyle has assured me that he believes that this is a proper, defensible process and I've been very clear in stating I believe we needed to make a change to the rule. I said, it is, therefore, should come as no surprise.

We've done the public process and now we're being very public about the enhancement. Lyle, maybe you want to take that.

Lyle Laverty: Felicity, let me just to build a little bit on the process and what we were able to do.

As we looked at the comments, we were able to separate those into general themes and we actually ended up with approximately 225 substantive issues that there were addressed in the comments. And, based on those issues, you know, the staff spent an exhaustive amount of time analyzing those comments and then making the appropriate adjustments back into the final rule that we have.

In terms of the enhancements, what I believe, again, my time as a line officer, the benefit is going to be to focus our collective resources, whether it be action agency or the Fish and Wildlife Service or the National Marine Fisheries, to focus our energies on those actions that truly have a potential effect on a species. And, if we can even sort – once the agency determine which is authority they currently have, there's no effect, the conversation can be over and we don't need to go any further.

And, I guess, specifically on your question, how would it benefit species? I believe it would free up the Fish and Wildlife Service agency resources to work on those highest priority cases, those cases that really are going to be significant to the species at risk.

And I believe, you know, that also that same application applies with NOAA as we deal with limited species that are in front and center conversations with us as we speak right now. Whether it's salmon or smelt, or whatever it might be, those have become the opportunities for species that we can give that focused resource attention from staff skills.

Felicity Barringer: Thank you very much.

Chris Paolino: Next question.

Operator: Dina Cappello, you may ask your question.

Dina Cappello: Hi. Can you all hear me?

Chris Paolino: Yes, we can.

Dina Cappello: Hi. This is either for one of you, Dale or Lyle or the Secretary. When you initially proposed this rule, you said that you said that this would actually

reduce the number of consultations. Now, you're saying it's a little bit narrower. So, my question is, are you still expecting it to reduce the number of consultations that FWS and the Fishery Service has to do, and, if so, by how many?

Lyle Laverty: Dale, you want to make a stab at the number?

Dale Hall: Oh, I really, we haven't sat down to do any numbers yet. As any operational mode becomes – comes on line and it's new, it takes a little while with experience just to see how much it's reduced. What we are fairly confident in is that there will be a reduction because there are a lot of those, you know, not likely to adversely affect determinations that we have to take time to respond to.

There will be some reduction in that but, at the same time, action agencies tend to be very cautious in making those calls. So, I think the real world answer is, it will probably take us, you know, a few months to see how it plays out as far as numbers, but we do expect a reduction.

Lyle Laverty: Dina, if I could just pick up on Dale's comment. The categories that the Secretary addressed, when he shared in his remarks, when we begin looking at projects and I guess this becomes the maturity that will come once agencies understand what this is, when they realize they don't have to consult on a project when that project is wholly beneficial, yeah, when we know that we cannot meaningfully evaluate those potential impacts or linking it back to this global process, I think as we learn how to work with this new tool, that there will be some changes.

That they may be slow at first, but I believe over time, we're going to find that things are going to be much more efficient and, if we can even take those off

the table, I think that becomes the value add to the language we proposed here.

Chris Paolino: Next question.

Operator: Jeff Young, you may ask your question.

Jeff Young: Hi, Secretary. My question has to do with the timing of this. Given that you have what, 39, 40 more days in your position, doesn't this really just serve to tie the hands of the next occupant of your position? Why the rush now?

Dirk Kempthorne: Jeff, let me ask you a question. Do you think that Eli Manning should have left the football field five minutes before the game was over in the last Super Bowl?

Jeff Young: If I were a fan of the opposite team, maybe yes. But, go ahead.

Dirk Kempthorne: That's the only answer I can accept. But no, we have a term of office by which we are to carry out the responsibilities that we have placed here in a public trust.

For me to now state, that because there are 39 days remaining, all cabinet secretaries are now to withdraw or go into some sort of a mode of not doing anything? I think that would be – nobody would suggest that.

I've taken what time I've had, which has been approximately 2-1/2 years, to deal with some very tough issues, including, the polar bear, which was very extensive. I think we had something like, I know it was over 600,000 comments. But, we ultimately came to a conclusion and on that very day, I said we now need to make a change to the rule.

So, add up all those days, that was still in the beginning of the fourth quarter. So, no, 39 days, we have 39 days of work and we owe it to the public to keep working.

Jeff Young: Thanks.

Chris Paolino: Next question.

Operator: Steve Davies, you may ask your question.

Steve Davies: Yeah. Steve Davies with “Endangered Species & Wetlands Report.” In the interest of transparency, I would urge you to post on line any comments that were received on the proposal from Fish and Wildlife Services’ or NMFS’ regional offices. That would be helpful.

My question, however, is who actually wrote the proposal and the final rule or was there a lead author? I think I have an idea who it is, but, if someone could help me out there.

Lyle Laverty: Could you just – restate that statement? I’m sorry I missed it.

Steve Davies: Who actually wrote this rule?

Steve Davies: My understanding is it really was not anyone in the Fish and Wildlife Service but the solicitor. Is that right?

Lyle Laverty: Steve, let me take this on. We had a really an integrated team working that with the NMFS’s folks, with Fish and Wildlife folks and the whole (unintelligible) folks, you know. And we take it as an integrated team that crafted this and we had folks from NOAA, they were actively engaged in the

development of the rule. So, it's – I think it's a reflection of all the agencies that understand the urgency and the need to do this.

Steve Davies: Okay. There was no lead author, really? It just came together?

Lyle Laverty: No everyone had the responsibility on this call, I would tell you that it's a team effort that brought this together.

Steve Davies: Okay. Thank you.

Chris Paolino: Next question.

Operator: (Juliet Eilperin), you may ask your question.

Juliet Eilperin: Hi. One very quick thing which is, can you give us a breakdown when you said there 230,000 comments, you know, how they broke down against, you know, even broadly speaking, like a majority one way or another?

And, second of all, I was wondering when both Secretary Kempthorne and Dale Hall spoke about, you know, the limited – how the science isn't there to make a connection between power plants and so forth, I was just wondering if either of you can speak to whether, I know, you obviously also issued a 4d rule today, to what extent you think there's a definitive connection between anthropogenic warming and the polar bears' predicament.

Dirk Kempthorne: Okay, Dale, do you want to take that and then I'm going to have Lyle do a breakdown on...

Dale Hall: So, you want me to take the second one?

Dirk Kempthorne: Yes, please.

Dale Hall: I think that and, Juliet, I want to make sure I understood your last question there. You want to ask a question about how do we think that anthropogenic forces are speeding climate change? Is that what you're asking?

Juliet Eilperin: No, no. The question do you think the fact that the polar bear is facing extinction as your agency has determined, to what extent is the driving force of that, the driving reason behind that is there's human induced climate change?

Dale Hall: Well, I think that...

Juliet Eilperin: Do you think the science is settled on that or do you think that's an open question?

Dale Hall: Well, at least, from my perspective, and I think for most of us in the Department of the Interior, that the question is settled. That man's impacts are certainly driving a faster change. If you look at the science that the IPCC put together, and the temperature movement along with the increase in CO2 concentrations in the atmosphere, it just passes anything that we've seen in history. And so, at least for me, I think that there's a direct correlation.

And, I think that the efforts that need to be made are to try and figure out how we can bring those things under control.

Dirk Kempthorne: And, (Juliet), I would just add that we do not believe the science is there to make the causal link. That activities, for example, down in the Lower 48 that you can do a direct line from that action or activity, to the take of a polar bear.

So, let me turn to Lyle then with the comments that in.

Lyle Laverty: (Juliet), as I mentioned, we had about 234,000 comments that actually came in and the breakdown and the comments are included and incorporated in the preamble of the rule that will be published. Sorry, can't tell you how many were actually for or against. I think...

Juliet Eilperin: You don't have any assessment, cause I certainly have frequently been able to ask this question and get an answer at press conferences for the environmental rule.

Lyle Laverty: I can tell you that I know those comments are all captured and recorded in the preamble. I'm sorry I don't have the number of for or against right now.

Dale Hall: Lyle, I think we can help a little bit. You know, I don't have exact numbers either, (Juliet), but there were, you know, probably in the neighborhood of 150,000 of the 235,000 that were either form letters that all consistently said, you know, they didn't give us any specifics but basically said, we don't want this change.

And then, probably another grouping under that, after that, so there was anywhere from, you know, probably upwards around, I'm guessing now because we haven't counted them, around 200,000 or the 235,000.

But what needs to be understood from a legal standpoint, when we get a comment that just says, I'm for this or I'm not for this, that makes – what we're looking for is specific comments on what we've said and questions about those specific comments. And that really is what drives our movement from any kind of – any time from a final, I mean, from a draft to a final.

Juliet Eilperin: Thanks.

Lyle Laverty: (Juliet), if I could pick up again and add on to Dale's comment, we did end up with about 234,940 comments, 50,000 of those were electronic letters that came through us. And, of those electronic letters, 48,000 were actually just replications for that. We had 116,000 that were identical letters that came from organizations. We had another 44,000 set of letters from another organization that were all replications.

Juliet Eilperin: So, the vast majority were against the rule even though they were form letters but in terms of the sentiments expressed?

Lyle Laverty: Right, but I think...

Juliet Eilperin: Right? Is that what you're saying?

Lyle Laverty: The important part is that it captured the substantive comments rather than just a total vote count.

Juliet Eilperin: But just to clarify. Now the way you've totaled it, that's roughly like, almost 200,000 that you're saying were some sort of form letter against the rule, is that right? 48,000, 116,000 and 44,007 is that right?

Lyle Laverty: Those are all against the rule...

Dale Hall: No, that's accurate, (Juliet).

Juliet Eilperin: All right, just making sure that's accurate.

Dirk Kempthorne: And, I know you're in Poland, so we appreciate that you've called in, because your on a different time.

Juliet Eilperin: I'll be working late tonight. It's okay.

Dirk Kempthorne: I know, safe travel.

Juliet Eilperin: Correct.

Dirk Kempthorne: Anybody that's on the call, let me just clarify as well. But, polar bear was a listing decision and that's Section 4. This deals with the rules governing consultation and that's certainly a different part of the ESA, that's Section 7.

Okay, next question.

Operator: (Allison Winter), you may ask your question.

Allison Winter: Hi, this is for Dale Hall. You mentioned that you had concerns with the process. What were those?

Dale Hall: Well, you know, I was concerned about the compressed timeframe and the large number of comments and our staff's ability to do the quality work that we usually do on trying to work through the comments. And so, I expressed my concerns and we've talked about them openly. And that's why I compliment the Secretary on this.

I'm one advisor to the Secretary. The Secretary has Lyle Laverty, the Assistant Secretary. He has David Bernhardt, the solicitor. And, we as a team, give him advice. And the real world is, just like at home, we don't always agree.

And so, the Secretary ends up having to make a decision and, you know, I have respected that it's the Secretary's decision and encouraged him to make the decision he thinks is appropriate.

Allison Winter: And does the rule deal at all with adverse modification?

Dale Hall: I don't believe we got into that. Did we Lyle?

Lyle Laverty: No, it does not.

Chris Paolino: Thank you, next question?

Operator: (Jane Kay), you may ask your question.

Jane Kay: Yes, when you're saying that the reason – you're saying there was an opinion on how the Endangered Species Act was going to deal with threats of greenhouse gas and the conclusion was that it's not possible to track specific emissions around the globe to the point of saying this will cause the ice to melt and in turn that would hurt the polar bear. And, I'm wondering, who developed this criterion? I mean which scientist said that this could ever be done? You know, when you limit for mercury and other contaminants, I've never seen that kind of link demanded where you could say, this emission of mercury from this particular source hurt this particular fish.

Dale Hall: Would you like me to answer that Mr. Secretary?

Jane Kay: Yeah. I'm sorry.

Dirk Kempthorne: Yes, Dale, please.

Dale Hall: The – it was the Congress that said it and the courts that interpreted it. When you talk about the prohibition in Section 9 in the Endangered Species Act, and all laws are not the same and how they – and how they mandate enforcement.

You know, the mercury standard is under other laws that are more general in their scope and the Endangered Species Act has a very specific criterion under Section 9, which prohibits take. And it says that an entity, we have to identify the entity that is responsible for taking a listed species.

And then, the 9th Circuit has chastised us in the past of what, their words, for not “connecting the dots” and showing how we could take that action and track it to the point where we could say because of that action, this take occurred.

So, the Endangered Species Act is constructed a little differently than some of the other laws and, whether we agree with it or don’t agree with it, you know, that’s the way the law is written and that’s the way the courts have interpreted it when we’ve lost cases over that kind of interpretation. And they’ve told us we couldn’t speculate.

And so, that’s what we’re talking about. That we believe we have to have a standard of science that allows us to track that impact all the way back to its source so that we can apply the responsibility and take law enforcement action on that source. And that is different from many of the other laws we deal with.

Jane Kay: Okay. I have one follow-up question. Are you saying tracking it back to its source are you – you want to track it to greenhouse gas emissions...

Dale Hall: No, no to the entity.

Jane Kay: To a path or to an individual power plant?

Dale Hall: When we have to bring it – when we take – if we were going to take law enforcement action and we’re doing Section 7, we have to hold, and this has

been held in courts as well, we cannot hold one entity responsible for the actions of another entity.

So, we have to be able to go, that if a power plant is being built in Missouri, and greenhouse gas is being emitted and we know the greenhouse gas is helping to speed temperature increases, which is melting the polar cap, we have to, under that law, be able to show how that power plant in Missouri had a direct line. We have to be able to track those gases and those impacts, those temperature increases, to be able to show that's what caused that ice to melt that the polar bear lived on and, therefore, a take occurred.

And, like I say, whether we like that or not, that's the way the law is constructed and the courts have directed us to deal with this.

Chris Paolino: Thanks. I think we have time for one more question. Operator, last question.

Operator: (Renee Shoof), you may ask your question.

Renee Shoof: Hi. Could you please tell me how you address the argument that, in some cases, an agency may have certainly no intention of doing anything to harm endangered or threatened species, but wouldn't know without expertise, something that would happen in another part of the range or in this whole complex ecosystem, that harm would indeed occur? So, why in many of these cases, you know, the efficiency argument aside, isn't it better to have the expertise at the beginning?

Lyle Laverty: This is Lyle. There really is nothing in the rule that precludes agencies from seeking that kind of support or consultation with the agency. Again, going back to the process, if an agency is going to propose a project, I look at it and view it as three gates and maybe this can help answer the question.

You know, the first gate they're going to go through is making that determination if it's going to have an effect on the species. And most of the agencies, I can tell you, have the kind of skills that can help make that determination.

Now, there are going to be some cases where they just don't know and that's where they want to come through this second gate and they want to come and visit the agency in this informal consultation process to determine whether there is or is not going to be an affect.

And, if it gets to the point of your question, that if they don't have that expertise or that skill, that doesn't preclude them from coming to the Service and asking for that kind of help.

So, there's nothing in this rule that would preclude that, but it just reinforces, again, the opportunity for proponent agencies to engage with the service or, if they, you know, feel comfortable that they have the knowledge base to know that it is going affect, all of a sudden, it moves them into that formal consultation.

Dirk Kempthorne: Dale, did you want to add to that at all?

Dale Hall: No, I think that that's a pretty good explanation but, along with it, our experience in talking with – me talking with our people out on the ground, there has been a significant shift in these other federal agencies where we used to doing a consultation we would almost be talking to the engineer.

Now, these agencies have hired very qualified biologists who are concerned about their reputations as well, and the quality of that consultation is improved a lot and the sort of downstream effects, if you will, the court cases have put us all on alert, including the action agencies, that you better pay attention to

that. And, in the end, they are held culpable for any take that occurs that they didn't account for.

Just because they didn't intend it and a take occurs, they agency is still accountable.

Dirk Kempthorne: Okay. Let me thank all of you for taking the time to ask these very good questions and for your interest.

I'm going to summarize this thing. On May 14, I announced the listing of the polar bear. We made it very clear that the Endangered Species Act was never intended to be a backdoor opportunity for climate change policy. Many, many people agreed with it. Being the entity that listed the polar bear, I felt it was important that we also make sure that we make a modification to those rules so that that door doesn't – allowed to be opened and it's not beneficial.

We said that we would make modest modification changes and we were very transparent about that. We put it out there; we invited public comment. We actually extended public comment by 30 days so that we could get additional. While a majority of those comments filed were in the category of a form letter or form comment, we took those that had substance and, because of that, we then modified the language of what that final rule now looks like.

And, as Dale Hall has stated, the rule itself does help. It clarifies. It is of benefit.

And so, that is the action we're taking today and, again, I appreciate your coverage of this because it is an important issue.

But, again, being the department that is dealing with these issues, I thought it was important for us to make this correction.

Chris Paolino: Thank you, sir, and thank you everyone who joined us on the call.

These final regulations will be posted on our Website, www.doi.gov. We have sent the final regulations to the Federal Register today. They will become effective 30 days following their publication.

Thank you again for joining us. This concludes the call.

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